

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 FEREYDUN TABAIAN and AHMAD)
4 ASHRAFZADEH,)

5 Plaintiffs,)

6 vs.)

7 INTEL CORPORATION,)

8 Defendant.)

No. 3:18-cv-00326-HZ

March 20, 2019

Portland, Oregon

15 **TELEPHONIC MOTION HEARING**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MARCO A. HERNANDEZ

18 UNITED STATES DISTRICT COURT JUDGE
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P R O C E E D I N G S

THE CLERK: Good afternoon. This is the matter of Tabaian, et al. versus Intel Corporation, Case No. 18-cv-326, Judge Hernandez presiding.

This is the time set for a motions hearing. Please note we have a court reporter present, so please identify yourself each time you speak.

Counsel, please tell me who all is on the record, starting with the plaintiff.

MR. CLOSE: Good afternoon. My name is Howard Close. I'm representing the plaintiffs in this case.

MR. LOVE: Also, this is Jeff Love, representing the plaintiffs, from Klarquist. And with me at Klarquist is James Geringer and James DeRouin.

MR. McANDREW: And, Your Honor, also representing plaintiffs here in Houston, for Wright Close & Barger, Patrick McAndrew, Andrew Love, and Ronnie Flack.

MR. SUMMERSGILL: Good afternoon, Your Honor. This is Michael Summersgill, Wilmer Hale, on behalf of Intel.

I have with me Todd Zubler and Grant Rowan, also of Wilmer Hale. And Mashood Rassam from Intel is also on the line. And I believe Anna Joyce, our local counsel, is on the line as well.

MS. JOYCE: That's correct. I am.

THE COURT: Good afternoon. This is Judge Hernandez.

1 We're here to resolve a couple of issues, one of them
2 a little bit thorny, having to do with the matter of
3 plaintiffs' contentions, and then the other one having to do
4 with are we using the Northern District of California rules or
5 aren't we?

6 So let's start with the easy one: Are we using the
7 Northern District of California rules or aren't we? The
8 answer is yes, we are using the Northern District of
9 California rules.

10 Let's move back, then, to the next issue that's a
11 little bit thornier; and that has to do with the matter of the
12 motion to compel. The defense is asking the Court to limit
13 the plaintiffs to three theories of the case or three
14 infringement contentions. And they sent in kind of a
15 description of how they were breaking out the 13 theories and
16 asking me to direct the plaintiffs to choose three of those
17 13.

18 I will say that recently, it seems in the last
19 couple, few days, I received a submission on the part of the
20 plaintiff which suggested to the Court that they were, in
21 fact, picking out three theories of the case.

22 And then within the last -- I don't know -- five
23 minutes or so I looked at a response to that, indicating that
24 Intel felt that really that's not three theories; it's more
25 like 11 theories, and none of those 11 match up with the 13

1 original theories that were submitted. And they are not three
2 theories that the defense was actually hoping would limit the
3 plaintiffs' infringement contentions in a way that they had
4 originally alleged.

5 That's my summary of what's going on.

6 So let me hear first from Intel. It's your motion to
7 compel.

8 MR. SUMMERSGILL: Thank you, Your Honor. This is
9 Michael Summersgill.

10 And we agree the issue is a little bit thorny and
11 complex because of the nature of the contentions.

12 So plaintiffs' November 16 infringement contentions
13 assert 13 different theories, as Your Honor indicated. And as
14 is set forth in the papers and just by way of example, they
15 say that the claim's calibration control circuit of the patent
16 can be six different combinations of 11 different components.

17 Now, the point of infringement contentions is to give
18 defendants notice of what they're being accused of and to
19 focus the case. And we suggest that what the plaintiffs have
20 done in their infringement contentions is exactly the
21 opposite.

22 And, as Your Honor indicated, they did file an
23 amended set of infringement contentions on Monday night. And
24 they appear to recognize, in doing this, that they should have
25 to narrow those contentions. And in those contentions, they

1 purport to be narrowing to three theories, but as I'll get
2 into, their -- their amended contentions actually compound the
3 problem because they are, in fact, 11 theories. And they are
4 11 new theories that are different from the prior 13 theories.

5 So I'll start with the points on why they should be
6 limited. And then I can address their latest submission, if
7 that works for Your Honor.

8 THE COURT: Go ahead.

9 MR. SUMMERSGILL: So we would submit they should
10 be -- that the limits we've asked for are warranted for three
11 reasons. First, their 13 infringement theories in their
12 November 16th contentions effectively conceal from us the
13 theories that they intend to pursue and interfere with our
14 ability to prepare -- prepare our defenses.

15 And, as I said, the point of infringement contentions
16 is to put the defense on notice and to focus the issues in the
17 case, narrow the issues in the case. And that's in multiple
18 cases, including the *O2 Micro* Federal Circuit case that we
19 cited in our brief.

20 The language in *O2 Micro* is that the point is "to
21 require parties to crystalize their theories of the case early
22 in the litigation." Then it goes on later, page 1365, to say
23 they're "designed to allow the defendant to pin down the
24 plaintiff's theories of liability."

25 The same point is made in the Northern District of

1 California *Shared Memory Graphics* case that we cited in our
2 briefs and in other cases that we cited. But the plaintiffs'
3 contentions, the November contentions, have done the opposite.

4 And, Your Honor, we submitted a number of -- five
5 slides for the argument. I'm hoping they made their way to
6 you. We submitted those earlier today. Did you receive
7 those?

8 THE COURT: I did.

9 MR. SUMMERGILL: Okay. So if you could turn -- and
10 we served them on the plaintiffs as well. Hopefully the
11 plaintiffs have them as well.

12 But if you could turn to slide 2, that shows their
13 13 different infringement theories; and that's the way in
14 which they presented them to us. And what shows on the top of
15 the chart are the high-level claim limitations that are
16 required by their patent. And then each of their separate
17 theories along the left column, A1 down to G, lists the
18 different theories. And what they've listed there are all of
19 the different components in the Intel circuitry that they
20 allege meet each of those limitations.

21 And in those 13 infringement, theories they've argued
22 that six different combinations of 11 different components
23 could be the calibration control circuit. Four different
24 components could be the droop outputs. Three different
25 functionalities could be the (inaudible) --

1 THE COURT REPORTER: Counsel, this is the court
2 reporter. I couldn't hear you clearly.

3 Three different functionalities could be --

4 MR. SUMMERSGILL: -- the sense outputs.

5 Sorry. I'll try to keep my voice up.

6 And it goes on, where they're accusing many different
7 components of meeting the various claim limitations.

8 Now, there's no way they could present all of those
9 alternative theories if the case were to go to trial. So by
10 presenting all of those theories, they effectively conceal
11 from defendants the ones they intend to pursue. They're
12 effectively burying the theories they will pursue among the
13 many they will not.

14 And given the discovery limits, the normal discovery
15 limits, Intel can't effectively address each of those
16 theories, as we could if they submitted a normal number of
17 theories. We couldn't, for instance, address 13 different
18 infringement theories in a single deposition.

19 And, by way of example, we've already taken the
20 depositions of two of the non-plaintiff inventors; and we had
21 to do it without knowing which of the 13 infringement theories
22 they were going to pursue. And we're not -- we don't expect
23 to get another crack at those depositions. That's already had
24 an impact.

25 And when plaintiffs do this, Courts have recognized

1 that what -- the effect is that it unfairly conceals from
2 defendants the actual issues.

3 And I think Judge Alsup in the *Straight Path* case,
4 the Northern District of California *Straight Path* case,
5 captured it well. We cited this in our brief. But at a
6 status conference in that case, the plaintiff announced that
7 he was going to pursue 37 claims. Judge Alsup said, No,
8 that's not going to work. And he said, Well, ultimately I'll
9 reduce it to two.

10 And what Judge Alsup said is "Look" -- and I'm
11 quoting: "So two claims is good, but you got to get there.
12 And you can't start off with 37 claims and then figure out
13 which ones you're going to lose on and finally give it up,
14 give it all up at the end. Look, that's not fair to the
15 system."

16 And that's what's going on here. By presenting so
17 many theories, they impede or interfere with our ability to
18 develop defenses specific to those theories. And that's why
19 Courts in the Northern District of California, in this
20 district, and across the country have required infringement
21 contentions and compel a plaintiff to submit specific
22 infringement contentions when they are very big.

23 And that's what happened in the *Shared Memory*
24 *Graphics* case. The plaintiff in that case did not clearly
25 identify what components in the accused circuitry they were

1 saying met the limitations. And that's basically what's going
2 on here, because they provided so many different alternatives
3 that we don't know which way they're going to go ultimately.

4 The second point and the second rationale for the
5 limitations, Your Honor, is that by proceeding with these 13
6 infringement theories, it would impose both a significant
7 burden on the Court and on Intel; and most of that effort will
8 be wasted because, again, they're not going to pursue all 13
9 of these when they get to trial.

10 It would be a burden on the Court because it would
11 create additional discovery issues, it potentially creates
12 additional claim construction issues, and it would create a
13 significant burden on dispositive motions.

14 In addition to that, it would also force both the
15 Court and the -- and Intel to go through the claim
16 construction process, for instance, without the benefit of
17 knowing what theories the plaintiffs are ultimately going to
18 pursue.

19 It would create a burden on Intel in fact discovery
20 and in expert discovery and in summary judgment, in pursuing
21 all these many alternative theories. Again, we've already
22 seen that burden, both in terms of the depositions we've taken
23 and in preparing our invalidity contentions in response to
24 their infringement contentions.

25 And then the third piece, Your Honor, the third

1 reason for the limitations is that it won't cause the
2 plaintiffs any prejudice. As they've recognized, they can't
3 present all these alternative theories.

4 And they've had more than enough time and sufficient
5 discovery and information to be able to select the theories
6 they're going to pursue. More than eight months ago, in July
7 2018, we produced our core technical documents, including
8 128,000 pages of technical documents. We produced our source
9 code, which they and their experts have now reviewed 37 times.
10 We produced all of the detailed specifications relating to
11 FIVR.

12 They've taken three depositions, including two
13 30(b)(6) depositions of the two senior Intel engineers who
14 designed FIVR. And on top of that, they received a 90-day
15 extension from the original deadline for their contentions so
16 that they could further consider their contentions with their
17 technical expert, and that's why they ultimately filed in
18 November of 2018.

19 So having had access to all of that discovery and
20 having had, you know, roughly eight months to consider all
21 this, we'd submit that it's now time for them to come clean
22 with their real infringement arguments, the arguments they're
23 going to pursue.

24 And that's precisely what the Court said in the
25 *Diagnostic Systems* case that we cited in our brief. A similar

1 situation: Discovery had been going on for close to a year.
2 The source code had been produced. And the plaintiff was
3 still not narrowing their case. And the Court said, "The
4 bottom line is that after a plaintiff-patentee has had a
5 reasonable opportunity to review the source code for the
6 defendant's accused software product, the patentee's time for
7 trolling the proverbial waters for a theory of infringement
8 comes to an end and the patentee must fish or cut bait with
9 respect to its specific theory of infringement."

10 And that's what we're asking here. We want to know
11 what specifically we're accused with so we can -- as we go
12 through the remainder of discovery, as we go through claim
13 construction, we can develop our defenses to those specific
14 accusations.

15 Now, Your Honor, recognizing they have a problem,
16 and recognizing, we believe, that they should be required to
17 narrow their contentions, they made this filing on Monday
18 night, and they filed amended infringement contentions in
19 which they purport to reduce to three theories. But, as I
20 said at the beginning, there are two problems with their
21 amended -- their proposed amended contentions.

22 The first is they have not meaningfully narrowed
23 their infringement contentions. And if you could turn to
24 slide 3, Your Honor, I can explain why.

25 This is -- on slide 3, other than the "or" notations,

1 this is what they have presented as their purported three
2 theories of infringement. The highlighted "ors" are what
3 we've added to explain what they're doing here.

4 And what they've done is they've purported to have
5 limited their case to three infringement contentions labeled
6 as "A," "D," and "G." But, in fact, what they've really done
7 is they've merely restructured -- restructured the way in
8 which they present their infringement theories to combine what
9 they would have previously described as multiple theories into
10 three purported theories.

11 So what I mean by that is in their November 16
12 contentions, each of the 13 theories identify a single set of
13 multiple components that plaintiffs contend meet the claim
14 limitations. But now, in their purportedly narrowed
15 contentions, the theories include multiple alternative sets of
16 components that allegedly meet the claim limitations. And
17 that's what we've shown by highlighting the "ors."

18 So if you look at, for instance, their theory D on
19 slide 3, you see there's an "or" in the components that are
20 listed under "Regulator Circuit," an "or" listed under
21 "Calibration Control Circuit," and an "or" listed under "Load
22 Voltage Input."

23 Again, the labels at the top are their purported
24 claim limitations; and their theories are A, D, and G.

25 And the reason D isn't one theory is because they can

1 take the components listed at the top of the "Regulator
2 Circuit" box in D and combine it with the top of what's shown
3 in the "Calibration Control Circuit" box. They can take
4 what's at the top of the "Regulator Circuit" and combine it
5 with the bottom of what's in the "Calibration Control Circuit"
6 box. They can take the bottom of what's in the "Regulator
7 Circuit" box and combine that with the top of what's in the
8 "Calibration Control Circuit" box, and they can take the
9 bottom of what's in the "Regulator Circuit" box and combine it
10 with the bottom of the "Calibration Control Circuit." That's
11 four theories.

12 And then they can combine those four theories with
13 the two alternatives they've listed under "Load Voltage
14 Input." And that amounts to eight theories in that theory --
15 in that theory D alone.

16 And when you break out the alternatives, you end up
17 with 11 different infringement theories. And you can see this
18 on slide 4. And that is, when you look at slide 4, when you
19 apply the same methodology that they use in their November
20 contentions to present their theories, the amended contentions
21 actually include 11 infringement theories.

22 So this isn't a methodology that we came up with.
23 We're applying to their proposed amended contentions the
24 methodology that they used in their November contentions.

25 And so they've attempted to create the appearance of

1 narrowing their contentions when, in fact, they haven't
2 meaningfully done so at all.

3 The second problem with their contentions, their
4 proposed new contentions -- and this is potentially at least
5 equally a problem if not more of a problem -- is that it's an
6 improper attempt to significantly amend their contentions.
7 Each of these 11 theories listed on slide 4 is new. They're
8 different from the 13 theories the plaintiffs presented
9 before.

10 And if you can turn to slide 5, please, Your Honor,
11 that shows what is new.

12 So everything we've colored in red is something that
13 is different from what was in their prior November
14 contentions, and so you can see that each of the 11 theories
15 is a different combination of components than was presented in
16 their November contentions.

17 And if you turn to slide 6, just to give a further
18 specific example, that shows the calibration control circuit.
19 So at the top of that slide we've shown what they originally
20 were purporting met the calibration control circuit limitation
21 in three theories. We've shown that in blue. Those were
22 their November contentions. And on the bottom half of the
23 slide we're showing in red what they have added. So in each
24 instance they've changed the set of components that they're
25 saying meets the calibration control circuit limitation.

1 And, Your Honor, just to put in context what's going
2 on here, I think it's important to look back at the events
3 leading up to this. They were originally required to submit
4 their infringement contentions on August 14th. After their
5 expert was excluded because of an Intel conflict, the Court
6 granted plaintiffs a three-month extension to review their
7 infringement contentions with their technical expert and
8 submit amended contentions.

9 But when they then submitted those amended
10 contentions, they submitted entirely new contentions, which
11 are the 13 infringement theories that are the subject of our
12 motion. And they're now seeking to rewrite their contentions
13 a second time.

14 And this comes four months after the deadline for
15 infringement contentions, two months after we submitted our
16 invalidity contentions, more than eight months into discovery,
17 and after the claim construction process has already begun.
18 We've exchanged not only proposed terms for construction but,
19 in fact, draft constructions as well.

20 Now, the default presumption is that infringement
21 contentions are deemed to be final contentions. That's set
22 forth in multiple cases, but one example is the *Townshend*
23 *Intellectual Property* case that we cited in our brief. And at
24 page 3 it states, "The default presumption is that a party's
25 initial infringement contentions shall be deemed to be that

1 party's final contentions. Because of that, plaintiffs may
2 only revise their infringement contentions if they can show
3 good cause to do so."

4 And, in fact, back at the June 27th status conference
5 in this case, we specifically expressed the concern that they
6 were going to try and do this and -- and evolve their
7 contentions over the course of the case. And Your Honor
8 indicated to the parties that a "good cause" standard would
9 apply for amending contentions. And that's in the June 27th
10 transcript at page 30.

11 But in the plaintiffs' motion to supplement the
12 record with these proposed new amended contentions, they
13 haven't even tried to show good cause, and that's because they
14 can't. Because to allow them to rewrite their contentions at
15 this point would be fundamentally unfair to Intel when we've
16 already submitted our invalidity contentions, we've already
17 exchanged claim terms and proposed constructions, and we've
18 already been in discovery, including taking multiple
19 depositions for eight months.

20 And their attempts to do so is precisely the type of
21 shifting sands approach to litigation that Courts
22 have prohibited; and we've cited a number of cases in our
23 brief for that.

24 So, Your Honor, what we would request is that the
25 Court deny the plaintiffs' motion to supplement the record

1 with its 11 new infringement theories and instead require them
2 to select three infringement theories from their November 16
3 contentions, as requested in our motion to compel.

4 THE COURT: Thank you.

5 Let me hear from the defense -- excuse me, from the
6 plaintiff. Sorry.

7 For the plaintiff?

8 MR. LOVE: Howard, are you still on?

9 Sorry. This is Jeff Love.

10 MR. CLOSE: Your Honor, this is Howard Close. I'm
11 sorry. I had my phone on mute so I didn't make noise rustling
12 paper. I apologize.

13 THE COURT: That's okay. Go ahead.

14 MR. CLOSE: Your Honor, first of all, I appreciate
15 the Court clarifying that we're using the PLRs, because what
16 we've tried to do is we tried to map out the infringement
17 contentions in the original set of infringement contentions
18 using PLR 3-1 and then produced the documents for 3-2.

19 And just to give the Court a sense of what we're
20 dealing with here, the accused devices in this case have
21 multiple voltage regulators that are part of the Intel system.
22 They have multiple -- they have FIVR, which can be as much as
23 16 different FIVR zones have a voltage regulator in it. And
24 then there is an external voltage regulator that goes with
25 each one of these chips. So there's a reason why there are

1 multiple variations of a theme, as we're trying to understand
2 how and to allege how these infringe on the patent.

3 Number two, some of the infringement theories accuse
4 components in addition to the chip. There's external voltage
5 regulators and some testing and calibration equipment that are
6 just raised in some of these theories that we have.

7 The third thing is that, you know, you can have
8 alternative theories. I mean, we have alternatives theories a
9 lot of times in litigation, but it's -- but we are trying to
10 pare this process, pare it down, because we recognize we have
11 to be able to present a cogent prosecution to the jury and to
12 the Court. So we're trying to pare that down, but it's a
13 thing where the discovery is ongoing.

14 Now, my friend, Mr. Summersgill, mentioned a couple
15 things that I wanted to raise. You know, he said that -- you
16 know, that it's time to stop trolling around, looking for
17 fish.

18 Well, Your Honor, things are being added and produced
19 to us even this month. We had additional data put into the
20 source code computer after all these claims contentions were
21 done. There was additional data added to the source code
22 computer in January, after our claims contentions were done.

23 When Intel raised this issue with us, that "We want
24 you to pare these things down," we have spent additional time
25 trying to go through and trying to pare those issues down as

1 we looked through the source -- as we looked through the
2 source code computer. But, you know, the discovery is still
3 ongoing, and so we're still trying to work through the
4 material that Intel is giving us.

5 I don't want the Court to have the impression that we
6 had all these documents for eight months. I mean, some of
7 them we just got. You know, Mr. Zubler, who is on the call,
8 and I had a call to talk about some documents on the source
9 code computer; and we reached an agreement for them to go
10 ahead and produce them to us in the normal course of business,
11 with certain things excluded, and we got an additional
12 multiple thousand-page production today.

13 So there were -- you know, the discovery is ongoing,
14 and we're working with Intel on this, but it's not a situation
15 where we know all the things that are in their production yet
16 because they keep -- as they're required to do, they keep
17 producing stuff to us.

18 The other thing is the claim construction is ongoing.
19 You know, we think that after claim construction is the time
20 for us to narrow our contentions. The contentions are
21 apparently clear. Intel hasn't contended otherwise. And they
22 can -- the summary fits on one page.

23 And the differences on the contentions are primarily
24 due to alternatives, the specific elements, such as load
25 voltage input. But even if you look at their chart on load

1 voltage input, there are a couple of alternatives there. And
2 once we go through claim construction and those -- and terms
3 are defined, that's going to clarify the issues so that we
4 know what we're going forward with.

5 And the interesting thing is that this is not
6 affecting claim construction. We've been able to -- we've
7 identified (inaudible) --

8 THE COURT REPORTER: Mr. Close, this is the court
9 reporter. You are sounding a little muffled, so I need you to
10 start again.

11 "We've been able to -- we've identified" --

12 MR. CLOSE: We've been able to identify the terms for
13 claim construction. The Court said it only wanted 10 terms.
14 We've actually conferred with Intel. We've got it down to
15 where we only have eight terms that need construction by the
16 Court. We've been able to agree on two terms with Intel.

17 And the parties have -- you know, Intel hasn't asked
18 us, "Well, gosh, we need a lot more terms based on all these
19 other things that you have here."

20 And I hear what Mr. Summersgill is saying in terms
21 of he's worried about prejudice, but let's use the example
22 that he used. I've been to the -- Jeff Love and I have been
23 to the depositions in London of the two non-plaintiff
24 inventors that live over in England right now. We finished
25 both of those depositions before the end of the day. We

1 didn't take the full time that's allotted for the depositions.

2 There was no statement at the end of the deposition
3 that "Gosh, I needed to ask you a lot more questions, but I
4 don't know which ones to ask because of all these theories you
5 have." We finished both depositions well before the time that
6 is required for the depositions.

7 So, again, if that was an issue, I would have
8 expected Mr. Summersgill and Mr. Hirsch, one of the gentlemen
9 who were there, to have raised it then. But nobody raised it
10 then.

11 And, you know, if -- you know, they say they need
12 more deposition time and there's going to be other things, but
13 if something comes up where we need that, they can ask for it,
14 and we can confer with Intel on that.

15 I guess, in sum, the system is kind of working and
16 it's going forward. And, you know, we did send in a proposed
17 list of things to try to show that we could narrow some of
18 these terms down using the terms that were in the original
19 claim chart. But, again, I don't think it's something that
20 has to be forced by the Court at this point in time. That's,
21 I guess, my main response.

22 THE COURT: Do you have -- Mr. Close, do you have a
23 response to the defendant's statement that the new
24 infringement theories that you have forwarded to the Court
25 this week include components or features that were not

1 included in the 13 theories that were given back in -- I think
2 he said in November of last year?

3 MR. CLOSE: Your Honor, there are some things where,
4 for example, if you look in the A column, in terms of the main
5 things that they're saying that have been added -- let's see.
6 I'm trying to -- there's no change in the "Regulator Circuit"
7 section. In the "Calibration Control Circuit," there is
8 something from the PWM trim block.

9 I may need to get one of my more technical people to
10 explain this, Your Honor. Could I get Jeff or Ronnie to help
11 you with this?

12 THE COURT: Well, the bottom line is whether or not
13 the infringement contentions from March 12th match the
14 infringement contentions from November of 2018; and it sounds
15 like what you're telling me is they do not, that they are
16 different.

17 MR. CLOSE: They're not -- they're not different from
18 the standpoint of adding additional -- well, they're not word
19 for word the same. A1 is not same as A1.

20 THE COURT: Okay. Thank you.

21 MR. LOVE: Your Honor, this is Jeff Love for
22 plaintiffs. If the Court will grant Mr. Close a lifeline, he
23 was trying to call out to me on the technical points. I'm one
24 of the patent attorneys, and I can maybe address that in a
25 little more detail if you'd like.

1 THE COURT: Sure. Go ahead.

2 MR. LOVE: So what I'd like to do is direct your
3 attention to -- you could just use page 3 of Intel's most
4 recent submission, their little -- their PowerPoint or
5 whatever it is. So that has the three contentions that we
6 would like to go forward with.

7 And, you know, my understanding is that the only
8 thing that is entirely new, you could say, is if you look at
9 the "Load Voltage Input" column, and then you look at the row
10 D, you know, where it says "VIN" --

11 THE COURT: Yes.

12 MR. LOVE: So that's voltage in. And there's -- and
13 there's both a calculated and a sensed voltage in, which is
14 just two versions of the voltage in.

15 And the sensed voltage in, my understanding is that
16 was not in the -- that particular input was not identified in
17 the original contentions. But with respect to all the other
18 entries, the circuitry was all identified. But in some cases
19 we essentially rearranged the furniture. And we did this, in
20 part, because of what we were learning in the discovery and,
21 in part, because of their pressure for us to narrow things
22 now.

23 And the big narrowing point that they're raising is
24 this row D that you're looking at, that middle row, where they
25 say -- you know, they identify it as one, but it's really

1 eight.

2 Well, first off, I want to clarify, in those first
3 two columns where we say that, you know, the regulator circuit
4 or the calibration circuit is either this or it's this and the
5 external voltage regulator, if the external voltage regulator
6 is in for one, it's in for both, you know. And this is
7 just -- so even if you use their little algorithm, there's
8 only four combinations here. The external voltage regulator
9 is either in or out. And if it's in or out, the load voltage
10 input is either the PCU VOUT or it's the VIN.

11 So when you're talking about just the sheer number,
12 you know, it is fewer, significantly fewer. We've almost cut
13 the number in half, even by their counting. And when you're
14 talking about them being seven different theories, you're
15 talking about primarily load voltage input being one thing or
16 another thing, a pretty small element. You know, it's not a
17 big challenge to address those -- that number.

18 And then when it comes to the circuitry, it's all
19 circuitry that is identified -- you know, my understanding is
20 all except for that one thing I just mentioned, it was
21 identified in the original contentions, which is the moving
22 around the furniture. They understand it. It shouldn't be an
23 issue, really. It does simplify the case.

24 They blamed us for not, you know, supporting a motion
25 to amend. We weren't trying, at this time, to submit a motion

1 for leave to serve these amended contentions because we just
2 didn't have time to prepare it. What we had time to do at
3 this moment was to get them to them before the claim
4 constructions were submitted to the Court, which we did, and
5 then to get it to the Court, you know, in time for it to be
6 discussed on this call, because we think that this addresses
7 what the plaintiffs are asking for.

8 If we can narrow it down to, by their count, seven,
9 by our count three, with some variations on the load voltage
10 input and the external voltage regulator, you know,
11 that's -- that's a small number. And particularly in a case
12 where -- just so you know how we understand this, you know,
13 you've got -- you do have different infringement scenarios.
14 It's not like choosing one or the other. They infringe in
15 three different ways. That's the contention.

16 So, you know -- and so if you look at G, you'll see
17 at the bottom line on the second and the third columns, it
18 refers to "HVM tester." That's an infringement theory, and it
19 depends on claim constructions, on some of the claims that are
20 proposed. But that's an infringement theory that would take
21 place at the time of testing of the chips, because they
22 combine the chips with some testing equipment. So that's a
23 completely, you know, distinct theory. And it doesn't have
24 any "ors" in there. That's simple enough. I don't think
25 that's an issue.

1 And then A, that's just the chip. There's only one
2 "or" in there and it's on a simple issue, the load voltage
3 input. That's one input. That's not a problem.

4 They've got a problem with D. What D is trying to
5 address, among other things, is the idea that they combine
6 their chips with an external voltage regulator. And, you
7 know, D wants to take -- wants to look at that system as a
8 whole.

9 Now, ideally, we don't really want the external
10 voltage regulator as part of the accused system, because then
11 we've got an inducement claim, because Intel doesn't make the
12 external voltage regulator, but they induce people to make it
13 according to their specs.

14 And so -- anyway, so D is trying to address the
15 external voltage regulator situation, where it's either part
16 of the background of the infringement or it's actually a part
17 of the infringing circuitry. That's not too many.

18 So, you know, if the Court wanted to grant us leave
19 to serve these amended contentions, based on this hearing,
20 that would be terrific. But our plan was to file a motion
21 soon for that leave, where we would support it and justify it
22 in the way I've just described.

23 MR. SUMMERSGILL: Your Honor, this is Michael
24 Summersgill.

25 Might I make a number of -- may I respond, a number

1 of points in response to the points that Mr. Love and
2 Mr. Close said?

3 THE COURT: Yes. Go ahead.

4 MR. SUMMERGILL: So to start with the points that
5 Mr. Love made and to address your question, if you turn to
6 slide 5, each of these theories is a new combination of
7 elements. It's directed to a new -- new combinations of
8 accused features and components, combinations that the
9 plaintiffs did not make in their November 2018 contention.

10 So what Mr. Love and Mr. Close have described as
11 rearranging the furniture is taking -- in some instances it's
12 adding new components and in some instances it's taking
13 components that they said met one element and now moving them
14 to a different element and, you know, making entirely
15 different combinations. And so that affects our whole
16 approach to the case, because we've been -- we've been
17 preparing defenses based on one set of combinations and now
18 they have switched it entirely.

19 Second, if you look at -- back to the slide 3 that
20 Mr. Love was focused on, and he said D, that their theory D is
21 only four different combinations, respectfully, that's just
22 wrong as a matter of math. And in fairness to Mr. Love -- I
23 mean, I had to have our core IP partner, Grant Rowan, explain
24 it to me, just to make sure I understood.

25 But where you have the "or" in the "Regulator

1 Circuit," the "Calibration Control Circuit," and the "Load
2 Voltage Input," by definition, when you can take that, the
3 components on each side of the "or," and combine it with all
4 of the other components in the other boxes on the other side
5 of the "ors," what you come up with is eight different
6 infringement theories.

7 And so, again, we didn't make up this -- the
8 methodology that we used to show their different -- their 11
9 theories on slide 4. That's using the same methodology that
10 they used in their November contentions.

11 And very recently, on the point that Mr. Close made,
12 he said they have many different alternative theories because
13 there are many FIVRs. Well, each of the FIVRs is actually the
14 same set of circuitry, and they're accusing different
15 structures within one of those FIVRs. So that's just wrong.

16 Second, in terms of the suggestion that we haven't
17 been forthcoming with discovery, that they haven't had this
18 information for eight months, is again just incorrect. The
19 material we produced in January related to damages. It didn't
20 have to do with the operation of the FIVR system. It had to
21 do with what products included FIVR and what products didn't.
22 It related to the calculation of damages.

23 And, you know, I think one of the things that shows
24 it conclusively is the declaration of Ms. McLemore, which we
25 attached to our reply brief, and it shows they've come and

1 reviewed our source code 37 separate times.

2 They made the point about the depositions. But,
3 Your Honor, in an expert deposition, both -- and in an expert
4 report, the experts would have to address every single theory.

5 And so they have had all this information for a long
6 time, and it does have a big impact on us in discovery.

7 Finally, Mr. Close argued that they shouldn't have to
8 narrow their contentions until after claim construction. And
9 that's just wrong as a matter of law. The Northern District
10 of California rules, all the case law, require infringement
11 contentions before claim construction. And Courts
12 specifically require contentions before claim construction and
13 before discovery goes too far down the line so that defendants
14 know what they're accused of. And Courts routinely require
15 plaintiffs to limit the number of claims they're asserting not
16 only before claim construction, but before contentions.

17 So bottom line, Your Honor, is that what they are
18 purporting to submit, what they purport to submit on Monday is
19 entirely new. It's not narrowed. It's 11 infringement
20 theories that would cause us significant prejudice, to allow
21 them to do that this late in the case.

22 MR. LOVE: Your Honor, Jeff Love. Could I just --
23 particularly on that math point, I want to, if I could, just
24 reply briefly.

25 THE COURT: Not yet. Not yet.

1 MR. LOVE: Okay.

2 THE COURT: Thank you.

3 I have some questions on the math point.

4 In looking at the defendant's slide No. 3, it looks
5 like, as regards D, which is the one that the defense is
6 claiming actually is eight different contentions, that under
7 the "Regulator Circuit," the language, "this and regulator
8 circuitry in external voltage regulator," and then under the
9 "Calibration Control Circuit," it says "this and regulator
10 circuitry in external voltage regulator," what I hear the
11 defense saying is that -- I mean, the language after the "or"
12 is the same in both of those.

13 And I don't know that much about voltage regulation
14 in chips, but I'm going to guess that the bottom language for
15 "Regulator Circuit," "this and the regulator circuitry," and
16 the "Calibration Control Circuit," "this and the regulator
17 circuitry," is not something that the plaintiffs are
18 contending.

19 Also, if you -- you know, what happened is the
20 defense was saying that if you mix and match these, you end up
21 with four. But the way that I understand the plaintiffs are
22 approaching this, that's not the case. What you end up with
23 is two different possibilities.

24 So let me -- am I correct about that, turning to the
25 plaintiffs' contentions?

1 MR. LOVE: This is Jeff Love, if I can address that.

2 THE COURT: Go ahead.

3 MR. LOVE: With respect to that row D and with
4 respect to those first two columns, yes, it's just two
5 contentions are covered by those first two columns with those
6 two "ors." It's not intended to say that in a regulator
7 circuit, it doesn't include the external voltage regulator,
8 but in the calibration control circuit it does.

9 In both of them, either it's the circuitry on the
10 chip, which is the language above the "or" -- that's just
11 it -- or it's that plus the circuitry in the external voltage
12 regulator. So there's two -- there's two variations there.

13 And then the only other variation -- you know, they
14 talk about them -- want to call them four different scenarios.
15 I mean, those are two different scenarios. Because the only
16 way you get to four is you go all the way to the right under
17 "Load Voltage Input," and, you know, there's multiple inputs
18 that have data representative of load voltage. And so you do
19 have alternatives there, you know, but it's not like a whole
20 new theory. That's just a different -- different candidates
21 for the load voltage input.

22 It's not something -- for example, if you're deposing
23 somebody and you go through the entire theory, the two
24 theories, one -- well, first, you go through the one theory,
25 and then you address the theories with the external voltage

1 regulator. That's one other possibility, but it's just that
2 element, the external voltage regulator.

3 Then you address the theories of two different load
4 voltage inputs. For Intel, that's a piece of cake. That's
5 two inputs. It's not a whole new theory.

6 MR. SUMMERSGILL: Your Honor, this is Michael
7 Summersgill.

8 That -- that is not correct. And, you know, what we
9 have done on slide 3 and then what we've done on slide 4,
10 we're using their language. They used four.

11 And so when you look at the "Regulator Circuit" and
12 the "Calibration Control Circuit" limitations for what they've
13 identified as theory D, the first combination of elements,
14 using their language, would be what's on top of the "or" in
15 "Regulator Circuit" with what's on top of the "or" in the
16 "Calibration Control Circuit."

17 The second combination of elements would be what's
18 on top of the "Regulator Circuit" and on the bottom of the
19 "Calibration Control Circuit."

20 The third would be what's on the bottom of the
21 "Regulator Circuit" and the top of the "Calibration Control
22 Circuit."

23 And then the fourth would be what's on the bottom of
24 the "Regulator Circuit" and the "Calibration Control" -- and
25 the bottom of the "Calibration Control Circuit."

1 Those are four different sets of combinations. And
2 then when you can combine those separately with the
3 alternatives under "Load Voltage Input," you come up with
4 eight different combinations.

5 And this is significant because we're not talking
6 about apples, oranges, and watermelons. We're talking about,
7 you know, circuitry in a voltage regulator, where the
8 different -- different combinations of components interact in
9 different ways. So each one of these different combinations
10 presents different -- different issues.

11 And so, you know, it is not significantly narrower.
12 It is -- again, using their methodology, it's 11 different
13 theories, number one. And, number two, it's all new. They
14 can't dispute what we've shown in slide 5, which is that every
15 single one of the 11 combinations is a different combination
16 than what they presented in November. And it's too late in
17 the case to do that.

18 And so we'd ask that they be required to pick three
19 of their original 13 theories. They appear to agree that they
20 should narrow to three, and we think they should be required
21 to pick three of their original 13 theories.

22 They already got a 90-day extension. They've had all
23 this information. And to allow them to, you know,
24 significantly rewrite their contentions at this point would, I
25 think, cause Intel significant prejudice.

1 THE COURT: All right. Thank you.

2 Anything else?

3 MR. LOVE: Yes.

4 For the plaintiffs, to the extent Mr. Summersgill is
5 reading those first two columns in D as creating four
6 possibilities, as plaintiffs' counsel, I'm just saying two of
7 those possibilities were never intended and we are dropping
8 them or not asserting them, and it's only two possibilities.

9 It's not a matter just of the math. It's a matter
10 of what we're willing to narrow it down to. We are willing to
11 narrow it down, on those two columns, to the external voltage
12 regulator being either in for both of them or not in for both
13 of them. That's two possibilities.

14 THE COURT: But it does get multiplied by two based
15 on what's located in the "Load Voltage Input." There are
16 actually two possibilities there. So it becomes -- even by
17 what the plaintiff is suggesting to us here on the record, it
18 still becomes four possibilities.

19 MR. LOVE: Yes.

20 THE COURT: Okay.

21 MR. LOVE: The load voltage input is highly discrete.
22 It's claim construction dependent, as are these other
23 possibilities.

24 The rules contemplate that after claim construction,
25 things are going to be excluded, things are going to be in,

1 and there's going to be a final narrowing and amending of the
2 contentions accordingly. We're just trying to put those
3 possibilities on the table in advance, to the extent we can
4 anticipate them.

5 THE COURT: All right. Thank you.

6 MR. CLOSE: Your Honor, this is Howard Close. I just
7 wanted to raise one point.

8 THE COURT: Go ahead, Mr. Close.

9 MR. CLOSE: I didn't quite understand what
10 Mr. Summersgill's point was about using our theory.

11 But if you look back at their first -- first slide,
12 which has -- and this is under the D category. I mean, we
13 either have the -- the regulator circuitry on the external
14 voltage regulator in or it's out.

15 The only way that it's broken out into four there is
16 the difference between the load voltage input. But, I mean,
17 both on the column for "Regulator Circuit" and "Calibration
18 Control Circuit," we either have it in or it's out. And
19 that's what Jeff, I think, was trying to articulate. That's
20 how we put it when we (inaudible), so -- that's all I had to
21 add, Your Honor.

22 THE COURT: Thank you, all.

23 All right. I'm going to look a little bit more
24 carefully at these charts that I just received today and
25 compare them with the other things that have been submitted.

1 I will get you an opinion out, probably pretty shortly.

2 And with that, we are in recess. Thank you very
3 much.

4 MR. SUMMERSGILL: Thank you, Your Honor.

5 MR. CLOSE: Thank you, Your Honor.

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8 (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker

3-21-19

NANCY M. WALKER, CSR, RMR, CRR
Official Court Reporter
Oregon CSR No. 90-0091

DATE

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